

CASE NO. 83-230

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES GUARD, RICHARD H. WITKER, KARL
C. DETWILER, ELEANOR ULLUM, WILLIAM H.
KAUFMAN, GILBERT A. JARRARD, JAMES
LeFEVERS, WILLIAM E. BUNCE, JOHN H.
DUNCAN, JAMES W. McCLAIN, WARREN S.
McCORMICK, NEAL D. BRONSON, GRACE
KERSEY, RONALD FERRELL, CITY OF LEBANON,
Petitioners,

vs.

LESTER R. KILBURN,
Respondent,

ON WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

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QUESTION PRESENTED BY PETITIONER FOR REVIEW

Is it proper for a trial court to hold a hearing on the issue of whether a discharged, untenured public employee is entitled to a name clearing hearing when the public employer gives no reason for the discharge and does not disseminate any false and defamatory information about the employee?

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OPINIONS BELOW

The opinions below include the decision of the Ohio Supreme Court in State ex rel. Kilburn, v. Guard, 5 Ohio St. 2d 21, 5 O.B.R. 81, decided May 18, 1983. Also included are the decisions of the Twelfth Appellate District Court of Ohio dated April 28, 1982 and of the Warren County Court of Common Pleas dated December 19, 1979. These decisions are set forth in the Appendix.

STATEMENT OF THE CASE

A. Procedural History of the Case.

In August, 1979, Respondent, Lester Kilburn, filed a complaint arising from the circumstances of his discharge in January,

1979 as Chief of Police of the City of Lebanon, Ohio. Petitioners were named as defendants in this case. The complaint listed five causes of action, including an application for writ of mandamus and complaint for damages for violation of civil service law, and claims for relief under the federal and state constitutions. The complaint was filed in the Warren Court of Common Pleas of the State of Ohio. On October 16, 1979 the trial court denied the application for writ of mandamus. The case was dismissed on January 2, 1980 when the Common Pleas Court sustained defendants' motion for summary judgment. These decisions were appealed on January 18, 1980 to the Twelfth District Court of Appeals for Warren County, Ohio. This appeal was based on two Assignments of Error:

1. That Plaintiff was wrongfully denied his rights to a "name clearing hearing" and possible damages pursuant to 42 U.S.C. Section 1983;

2. That he was denied his application for writ of mandamus.

On April 28, 1982 the Court of Appeals reversed the granting of summary judgment on the basis of the First Assignment of Error, and affirmed the Trial Court's decision in the Second Assignment of Error.

The reversal on the first issue was appealed to the Supreme Court of Ohio by the defendants. Kilburn did not cross-appeal the denial of the application for writ of mandamus. On May 18, 1983, the Ohio Supreme Court affirmed the decision of the

court of appeals and remanded the case back to the trial court for an evidentiary hearing that would "afford plaintiff an opportunity to demonstrate his entitlement to a Fourteenth Amendment due process hearing and to maintain a civil action under Section 1983 for damages..." (App. 7a).

B. Statement of Facts.

Lester Kilburn joined the Police Department of the City of Lebanon, Ohio in 1957. After eleven years of service and regular promotions through the ranks to Captain, he was appointed Chief of Police in 1968 by Charles Guard, the City Manager. Kilburn served in this position until January 3, 1979. While the other positions were not, the chief's position is exempt from civil service laws.

At the time of his discharge, Kilburn received no explanation for his termination. Kilburn's request for a statement of the reasons for his discharge was unanswered. However, at the time of his dismissal the city officials engaged in a related investigation into missing public funds. Public discussion and extensive coverage occurred in the media at this time connecting Kilburn's dismissal to this official investigation. The city's attorney kept promising a full report on a purported investigation. The report never materialized. Kilburn was refused a hearing before the city's Civil Service Commission on the grounds that the Commission lacked jurisdiction in the matter. Kilburn then filed his complaint in the Warren County Common Pleas Court, naming the Civil Service Commission, City Managers, the Chief of

Police, City Council members and the City of Lebanon as defendants.

ARGUMENT FOR THE DENIAL OF THE
PETITION FOR WRIT OF CERTIORARI

1. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257 In That The State Court Has Made No Final Judgment On The Federal Question.

The Ohio Supreme Court has ordered this case remanded for an evidentiary hearing in the trial court in order to afford Kilburn an opportunity to demonstrate his entitlement to a Fourteenth Amendment due process hearing and to maintain a civil action in damages.

A writ will be dismissed for lack of

jurisdiction where the state court's decision is not final under 28-U.S.C. Section 1257, the court having remanded the case for a trial, and where the case does not fit into the limited exceptions in which finality has been found as to the federal issue despite the ordering of further proceedings in the lower state court. O'Dell v. Espinoza, 454 U.S. 1122. See Cox Broadcasting v. Cohn, 420 U.S. 469. The state court, in affirming the reversal of the lower court's dismissal on summary judgment, made no judgment on the issue of whether or not Kilburn was entitled to a due process hearing and to maintain a civil action for damages under Section 1983. Determination of the merits of Respondent's federal claim await the ordered evidentiary proceeding. This proceeding on the merits of Respondent's federal claim is unlike the wholly unrelated accounting proceeding

ordered in Radio Station WOW v Johnston, 326 U.S. 120.

Further, the state court's decision cannot predetermine the outcome of the ordered proceeding. Mills v. Alabama, 384 U.S. 214. Respondent has simply been given the chance to present his claim. When the federal question is decided in the ordered proceeding, either side may seek appellate review. California v. Stewart, 384 U.S. 436. Petitioner's claim arises solely under Section 1983, and there are no state grounds for decisions in this case.

Since the state court's decision will not determine the outcome of an evidentiary hearing and either side may appeal a decision on the federal issue when one is forthcoming, and the case cannot be decided

on any state grounds, the case is clearly not ripe for review by this Court. Therefore this Court should refrain from taking jurisdiction under 28 U.S.C. Section 1257.

2. The State Court Decision Is Consistent With Applicable Decisions Of This Court.

This Court's approach to the due process problems of discharged government employees has been consistently flexible. In Bishop v. Wood, 349 U.S. 341, the discharged police officer was afforded some procedural protection under a local ordinance, and the lower court had found that these procedures had not been violated. This Court ruled that no deprivation of the employee's liberty interest ensued from the fact of his discharge unless the allegedly

false reasons for discharge were made public by the government.

The following year this Court decided Codd v. Velger, 429 U.S. 624. In Codd, this Court set out the test for determining the discharged at-will employee's entitlement to a name clearing hearing. This test requires the employee to show in the course of litigation that the employer created and disseminated a false and defamatory impression about the employee in connection with his termination. 429 U.S. at 627. Although the Codd facts involved specific information communicated from one government employer to another, the Codd test clearly avoids limiting wrongful state action to the communication of false and defamatory information. Rather, the language of Codd contemplates state action

which may or may not involve the act of creating and disseminating information which is false and injurious, but which must involve the creation and dissemination of a false and defamatory impression.

The state court, in finding an issue of material fact raised by the pleadings, read Codd correctly. Kilburn alleged that in connection with his termination there was an official investigation by the city and its officials into missing public funds; that the city's attorney repeatedly promised to make public a report on the investigation but failed to do so; that there was public speculation damaging to Kilburn's integrity and honesty at this time; that the city officials knew that his employment opportunities had been seriously jeopardized by this situation.

In these circumstances the state court concluded that there was an issue of fact as to whether the government conduct constituted the creation and dissemination of the requisite impression. This conclusion is entirely consistent with the Codd test since Codd contemplates that the state action, by some means, projects onto the community a false impression about the discharged public official. Codd refines the concept of "communication" which was enunciated in Bishop. Without some state action of communicatory value, the discharged employee has no cause of action under the rule of Bishop. Under Codd, the discharged employee must show that the government employer created and disseminated a false and defamatory impression about the discharged employee. But central and consistent in these cases, and what was re-

cognized in the state court decision, was the requirement that the discharged employee must assert and prove that the government by its own conduct caused to arise in the public mind a false perception of the discharged official.

The state court's decision is appropriate in this Case. Kilburn has alleged damage to his reputation by being fired without reasons stated by the defendants. He has alleged that this damage occurred by the manner and circumstances of his discharge; that is, the defendants' refusal to state reasons or give opportunity for reply, in the presence of much publicity which impugned his integrity. In addition, the defendants knowingly fueled this unfavorable publicity by their failure to ever release the promised report of their in-

vestigation of this matter. This was as crucial to plaintiff's loss of reputation as the defendants' conduct in Owen v. City of Independence, Missouri, 445 U.S.602 (1980). Kilburn, in this case, has no weapon against the conceded official silence which fuels the damage to his reputation, just as Owen could not combat the allegedly false reports released by the city official before his dismissal.

3. The Petition Should Be Denied Because
The State Court Reached a Fair Result.

The state court has decided that Kilburn's pleadings are sufficient to raise an issue of material fact in this case. Permitting him to develop facts in support of the merits of his cause will produce a final

judgment on the federal question, without prejudice to either side with regard to a right to appeal, the decision on the federal question.

Petitioners argue that the state court decision, if permitted to stand, will open the floodgates of litigation by discharged employees, contrary to established public policy. It may be fairly assumed that public employers enjoy the administrative efficiency afforded by the existence of untenured public jobs. However, the policies supporting the dischargability of these public employees without a hearing, does not license governments to cause warrantless injury to them, or to defeat the public interest by discouraging individuals of the highest integrity and competence from seeking careers in public service. There is no

honor to the government which follows this course, but only the erosion of the public good. This concern, we think, is inherent in this Court's flexible approach to these cases. The state court has done no more than give Kilburn his day in court, and its decision to do so should not be reviewed by this Court.

APPENDIX

THE STATE, ex rel. KILBURN, APPELLEE, v. GUARD et al., APPELLANTS.

(No. 82-904—Decided May 18, 1983.)

5 Ohio St.3d 21

APPEAL from the Court of Appeals for Warren County.

On August 3, 1979, Lester R. Kilburn, appellee, filed this action in the court of common pleas, styled "Application for writ of mandamus, complaint for violation of civil rights, complaint in damages, appeal from a decision of the Lebanon civil service commission and jury demand."

Kilburn joined the Lebanon Police Department in 1957, received regular promotions and was appointed chief in 1968 by the then city manager, Charles Guard. The position of chief of police is exempt from civil service [22] laws, Kilburn having served at the will of the city manager. At the time of his termination on January 3, 1979, no official explanation for the job action was given. The official silence ensued despite Kilburn's request for a statement of the reasons for the discharge and speculation in the media tying the dismissal to a contemporaneous investigation into missing public funds. The civil service commission denied Kilburn a hearing, finding itself without jurisdiction in the matter. Thereafter, Kilburn filed the instant action, joining the Lebanon city council members, civil service commission panel, former and acting city managers, chief of police, and the city itself as defendants.

The trial court granted defendants' motion for judgment on the pleadings and for summary judgment, finding that Kilburn's allegations of deprivation of his "rights, property and reputation" did not give rise to a cause of action for

which compensation could be awarded. The court of appeals reversed, finding an issue of fact for the resolution of the trier-of-fact as to whether the actions of the defendants damaged plaintiff's reputation for integrity and honesty.

The cause is now before this court upon the allowance of a motion to certify the record.

Turrell & Phillips Co., L.P.A., Mr. Roger B. Turrell and Mr. Stanley S. Phillips, for appellee.

Bauer, Morelli & Heyd Co., L.P.A., Mr. Arnold Morelli and Mr. J. William Duning, for appellants.

Per Curiam. This appeal is brought from the grant of summary judgment by the trial court. Summary judgment is appropriate only when it appears from the record before the court that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ. R. 56(C). Here, plaintiff seeks a name clearing hearing to refute charges arising from the termination of his employment as chief of police. Such a name clearing hearing is mandated in certain circumstances by the Fourteenth Amendment to the United States Constitution. A civil action for damages is available pursuant to the Civil Rights Act of 1871, as amended, Section 1983, Title 42, U. S. Code. These protections exist for the benefit of public employees whose discharge would otherwise stigmatize their reputation without due process of law. See, e.g., *Board of Regents v. Roth* (1972), 408 U. S. 564; *Codd v. Velger* (1977), 429 U.S. 624.

Procedural due process requires notice and an opportunity to be heard "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him * * *." *Wisconsin v. Con-*

stantineau (1971), 400 U.S. 433, 437. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny his future employment for other reasons." *Board of Regents, supra*, at 573, fn. 12.

This protection is founded on either the "property" or "liberty" compo- [23] nent in the Fourteenth Amendment's guarantee of liberty and property rights. "'Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' is liable for damages under Section 1983, Title 42, U. S. Code. It is established that these words were intended to encompass municipal corporations as well as natural 'persons.'" *Monell v. New York City Dept. of Social Services* (1978), 436 U. S. 658.

Accordingly, a claim to a name clearing hearing and for damages is made upon a showing of a deprivation of liberty and/or property. Absent a finding of a property right in continued employment, a name clearing hearing is required only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination so as to infringe on his right to liberty. *Codd, supra*, at 628.

This court, in *State, ex rel. Trimble, v. State Board of Cosmetology* (1977), 50 Ohio St. 2d 283 [4 O.O. 3d 447], rejected a public employee's asserted right to a name clearing hearing on her termination of employment, holding that "[a]n unclassified civil servant is not entitled to the Fourteenth Amendment due process protection of a hear-

ing before discharge when her asserted property interest in continued employment consists of one favorable job evaluation and permanent employee status and when her alleged liberty interest in reputation and future job opportunities is threatened by a discharge for 'behavior and performance in the past' and by a reprimand for behavior on one occasion."

As observed by Justice William B. Brown, to have a liberty interest needing the protection of a hearing, a discharged employee must suffer "allegations * * * sufficiently damaging to hurt * * * [her] reputation in the community or to foreclose her future employment opportunities." *Trimble, supra*, at 287. Leona Trimble, an employee in the unclassified service of the State Board of Cosmetology, received both a letter of reprimand one month prior to her termination and a letter which attributed the job action to her "behavior and performance in the past * * *." Considering the impact of both letters on her reputation, we concluded that Trimble's liberty interest was not violated.

In this case, defendants made no allegations at the time of Kilburn's termination, choosing to remain silent as to the reasons for the decision to fire him. In his appeal, Kilburn raises only the infringement of his liberty interest, i.e., that his employer created and disseminated a false and defamatory impression in connection with his termination, entitling him to a name clearing hearing and possible civil damages.

At the time the trial court granted defendants' motion for summary judgment on January 2, 1980, based upon "pleadings, affidavit, stipulations, exhibits, argument and memoranda of counsel in this action," it had before it [24] certain relevant documents. Most significant was Kilburn's affidavit which read:

"LESTER KILBURN, first duly cautioned and sworn deposes and says that he has personal knowledge of these facts and states as follows:

"1. That his reputation has been damaged by his being fired, without reason given, by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.

"2. That his employment opportunities have been greatly foreclosed by defendant Guard's action in that after 22 years as a police officer and chief of police with a spotless record, he has applied for a position either as chief of police, police officer, security officer, or insurance claims examiner in at least 12 instances unsuccessfully; that some of these prospective employers were Economy Fire and Casualty Insurance Company, Dayton Tire and Rubber Company, Doylestown, Ohio, Ohio, Sabrino, Ohio and Wayne Township, Montgomery County, Ohio.

"3. That affiant believes that the manner and circumstances of his discharge by defendant Guard were the reason for his loss of reputation and foreclosed employment opportunities.

"Further affiant sayeth not."

Also significant was the following allegation made in Kilburn's "reply memorandum contra defendants' motion for summary judgment";

"Hanging over Lester Kilburn is the spector [sic] of the well publicized 'investigation' which has now [December 1979] been taking place almost a year. The city attorney has promised, repeatedly, that the investigation report would be made and that copies of it would be given those directly affected. We have seen nothing except newspaper

publicity. At present, Lester Kilburn is in a position where he has been fired under circumstances where defendants have placed a cloud over him. The defendants without ever stating one way or the other, know that his attempts to get employment, his attempts to practice his trade or profession are seriously jeopardized. Where does this leave Lester Kilburn?"

Taken together, and in light of the peculiar quality of public trust vested in a chief of police, these averments raise the issue of whether the deliberate silence of the city and its officials concerning the reasons for Kilburn's dismissal may constitute an employer created and disseminated false and defamatory impression about Kilburn in connection with his termination, so as to infringe on his right to liberty. Given this genuine issue of material fact, summary judgment was inappropriate.

Although Kilburn has not yet demonstrated his right to a full due process name clearing hearing, given allegations that the city damaged his reputation, he is entitled to an evidentiary hearing in the trial court to determine whether he has a right to such a full name clearing hearing. While Kilburn did not demonstrate that any allegations of malfeasance of misfeasance were promulgated by city officials, we find that by granting defendants' motion [25] for summary judgment, the trial court prematurely foreclosed proof on those issues. Given the official silence and widespread speculation in the press, we cannot say on the basis of the record before us that Kilburn's liberty interest was not violated by the city and its officials. Upon further development of the facts surrounding his discharge, it may be demonstrated that defendants' actions sufficiently damaged Kilburn's reputation in the community or foreclosed his future employment opportunities to warrant a full name clearing hearing.

Accordingly, in order to afford plaintiff an opportunity to demonstrate his entitlement to a Fourteenth Amendment due process hearing and to maintain a civil action under Section 1983 for damages the judgment of the court of appeals which reversed the trial court's summary judgment for defendants is affirmed, and the cause is remanded to the trial court for further proceedings in accordance with law.

Judgment affirmed.

HOLMES, C. BROWN and J. P. CELEBREZZE, JJ., concur.

LOCHER, J., concurs in judgment only.

CELEBREZZE, C.J., W. BROWN and SWEENEY, JJ., dissent.

WILLIAM B. BROWN, J., dissenting. Because I believe the majority has unnecessarily subjected public employers to potential liability for routine administration of personnel matters, I respectfully dissent.

The effect of the majority's decision is to afford a discharged, nonclassified public employee a hearing whenever that employee alleges that the public employer remained silent as to the reasons for the discharge in the presence of unfavorable publicity. Such a result is neither mandated by case law precedent nor warranted by public policy considerations.

The United States Supreme Court held in *Codd v. Velger* (1977), 429 U.S. 624, 627-628, that a non-tenured employee who has been stigmatized by his discharge from employment is entitled to a hearing " ' * * * to provide the person an opportunity to clear his name' * * * [o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination * * *."

This test was applied as follows by that court in *Owen v. Independence* (1980), 445 U. S. 622, 633-634, at fn. 13:

"* * * [T]he city — through the unanimous resolution of the City Council — released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly 'occur[red]' in the course of the termination of employment. [26] Cf. *Paul v. Davis*, 424 U. S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law."

The majority found, as appellee so urged, that the statements in appellee's affidavit in opposition to appellant's motion for summary judgment, most notably the one that follows, raised a material issue of fact within the rule of *Owen, supra*:

"1. That his reputation has been damaged by his being fired, without reasons given * * * in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty."

Contrary to the majority's finding, this allegation, in my opinion, is insufficient to bring this case within the rule of *Codd-Owen*. First, the public employer herein was silent as to the reasons for the discharge. It neither created nor disseminated any information whatsoever regarding the discharge. These facts are in marked contrast to those of

Owen, where the public employer accused the police chief of theft, implied drug dealings and bribery, released pertinent investigation reports to the press, and requested a grand jury investigation. The silence of the employer is outcome determinative, for as the United States Supreme Court noted in *Bishop v. Wood* (1976), 426 U. S. 341, 348, the termination of public employment can make the public employee "less attractive to other employers," but if the reasons of the public employer are "• • • not made public • • • [they] cannot properly form the basis for a claim that • • • [one's] interest in his 'good name, reputation, honor or integrity' • • • was thereby impaired.

Secondly, and as in *Codd*, the employee herein made no allegations that the information regarding the discharge was false or defamatory. Appellee retorts that since the appellant did not state reasons for his discharge, he could not develop information to formulate "allegations of specific misconduct." This assertion, however, ignores the facts that appellee never raised the issue of "official misconduct" as a question of fact nor sought, pursuant to discovery rules, to obtain proof of such conduct. The absence of such an allegation is fatal to appellee's claim, for "• • • if the hearing mandated by the Due Process Clause is to serve • • • [its purpose of providing the person with an opportunity to refute the charge, then], there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Codd, supra*, at page 627.

The result reached by the majority herein is curious in light of this court's recent holding in *Smith v. Fryfogle* (1982), 70 Ohio St. 2d 58, 62-63 [24 O.O.3d 114]. This court, in a unanimous decision, found that "the comments of a single, non-participating trustee, made after the official meeting, do not constitute an act of the board; we conclude

that the board of trustees did not injure appellant's [fired township police chief's] reputation * * *." Indeed, [27] the facts in *Smith* were more compelling and more closely resembled those in *Owen* than those presented herein. Since this court was satisfied that no liability interest had been infringed upon in *Smith* in the face of negative public statement by a township official, then it should likewise be satisfied that no due process right was violated when, as here, the public officials involved made no comments whatsoever.

The majority's position conveniently loses sight of one crucial fact: pursuant to the terms of the city charter, the police chief serves "at will." The majority has cited no statute or other controlling precedent which would, under the facts of the instant case, limit the employment-at-will doctrine. Hence, the city was under no obligation to state the reasons for the discharge as long as it refrained from creating any impression with regard to the discharge by releasing false or defamatory information with respect to the discharge.

There is little doubt that whenever a public servant's at-will employment is terminated, there will be adverse inferences and speculations. Under the majority's analysis, the removal or dismissal of any public employee employed at will which is reported by the press will seemingly require a hearing. In effect, the majority has done away with at-will employment in Ohio, for the majority mandates that a public employer provide justification for all discharges. This is indeed antithetical to at-will employment. This result clearly defeats the purpose of having certain public employees in non-civil service status and hence runs counter to sound public policy.

Under proper circumstances, a nonclassified public employee has a right to a name clearing hearing. In the

instant case, however, the employee simply failed to plead sufficient facts demonstrating his entitlement to a name clearing hearing, and I would thus reverse the decision of the court of appeals which afforded such a hearing.

CELEBREZZE, C. J., and SWEENEY, J., concur in the foregoing dissenting opinion.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY, OHIO

CASE NO. 409

STATE, EX REL., LESTER KILBURN
Plaintiff-Appellant,
vs.
CHARLES GUARD, ET AL.
Defendants-Appellees.

MEMORANDUM DECISION AND
JUDGMENT ENTRY

[Filed April 28, 1982]

Mr. Roger B. Turrell, 2114 Central Avenue, Middletown, Ohio 45042, for Plaintiff-Appellant.

Mr. Arnold Morelli, Bauer, Morelli & Heyd Co., L.P.A., 503 Executive Building, 35 East Seventh Street, Cincinnati, Ohio 45202, for Defendants-Appellees.

Mr. J. William Duning, Lebanon City Building, Broadway at Main Street, Lebanon, Ohio 45036, for Defendants-Appellees.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12 (A) as follows:

Appellant, the former chief of police for the City of Lebanon, was terminated January 3, 1979, by appellee, city manager, without a hearing to determine whether there was "just cause." Appellant had commenced employment in 1957 and had become chief of police in 1968. It was alleged in oral arguments that the discharge was attended by a great deal of publicity and public comment.

Within seven (7) days of his dismissal, appellant filed an appeal before the Civil Service Commission in an attempt to obtain a hearing. The Commission refused to hear the appeal, claiming it lacked jurisdiction.

Following the Commission's refusal, appellant filed a five-count complaint which included an application for a writ of mandamus. The writ was denied October 16, 1979, and the parties have agreed that the fifth count in the complaint is moot. The trial court granted appellees motion for summary judgment and motion for judgment on the pleadings and a timely notice of appeal was filed.

Appellant has asserted the following assignments of error;

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN DISMISSING PLAINTIFF'S COMPLAINT WHERE PLAINTIFF PLEADS A DEPRIVATION OF RIGHTS OF PROPERTY AND REPUTATION AND IS GIVEN NO HEARING TO ATTEMPT TO SHOW SUCH DEPRIVATION PURSUANT TO 42 U.S.C.A. SECTION 1983.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFF-RELATOR'S APPLICATION FOR WRIT OF MANDAMUS.

Relative to the first assignment of error, appellant cites *Owen v. City of Independence, Missouri* (1980), 445 U.S. 622, 100 S.Ct. 1398. That case held that a police chief was denied "liberty" without due process of law when the city released allegedly false statements which impugned the officer's honesty and integrity and then discharged him without giving him specifications of the charges and an opportunity to clear his name. This cause of action is cognizable in a 42 U.S.C. Section 1983 claim. The cause is for damage to reputation and is not based upon a property interest in employment.

The complaint *sub judice* does not allege facts in line with *Owen*; however, the complaint alleged damage to reputation, in the third cause of action, to wit:

• • •

That such conduct deprives the plaintiff of his rights, property and reputation, protected by the Constitution of the United States and of Ohio.

Lester Kilburn's affidavit, attached to plaintiff's reply memorandum contra defendants' motion for summary judgment, states the following pertinent allegations:

1. That his reputation has been damaged by his being fired, without reasons given, by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.

That allegation brings appellant squarely within the rule pronounced in *Owen* and presents an issue of fact for the resolution of the trier-of-the-fact. Accordingly, the first assignment of error is well taken.

Relative to the second assignment of error, we note initially that the Lebanon City Charter expressly excludes the chief of police from classified civil service. *State ex rel. Lynch v. City of Cleveland* (1956), 164 Ohio St. 437, 132 N.E.2d 118, is authority for their legal right to do so and that case held in its syllabus:

1. Under the provisions of Section 3 of Article XVIII of the Constitution of Ohio, municipalities have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.
2. Under those constitutional provisions a municipality is authorized to choose its own method of selecting its own chief of police other than from a civil service eligible list.

Those cases cited by appellant are inapposite to the establishment of a right to a hearing when there is no property interest in the employment. Inasmuch as appellant was not in the civil service, he was not entitled to

rights thereunder. Section 133.01 (a) of the Lebanon Administrative Code specifies that the city manager shall have the power to discharge "at will any subordinate employee" Accordingly, the second assignment of error is not well taken.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellees, by their counsel, except.

HENDRICKSON, P.J., and KOEHLER, J.
JONES, J., Not Participating.

IN THE COURT OF APPEALS
OF WARREN COUNTY, OHIO

Case No. 409

STATE OF OHIO, EX REL.,
LESTER KILBURN,

Appellant,

vs.

CHARLES GUARD, ET AL.,

Appellees.

ENTRY

[Filed May 28, 1982]

This Court, having duly considered appellees' MOTION FOR RECONSIDERATION, and having found the same to be not well taken, hereby denies said motion.

/s/ HENDRICKSON, J.
William R. Hendrickson,
Presiding Judge

STATE OF OHIO, WARREN COUNTY, OHIO
COMMON PLEAS COURT

CASE NO. 41248

STATE, ex rel., LESTER R. KILBURN,
Relator-Plaintiff,

vs.

CHARLES GUARD, et al.,
Respondents-Defendants.

DECISION

[Filed December 19, 1979]

This matter is before the Court upon the defendants' motion for judgment on the pleadings and for summary judgment. For purposes of these motions, the Court has before it the pleadings, the affidavits filed in the context of the motion, and the stipulations of fact previously placed on record.

The Court's decision of October 16, 1979, has disposed of the issues raised in the plaintiff's first cause of action. Plaintiff concedes that his fifth cause of action has become moot and it has been withdrawn. Therefore the present motions pertain only to the second, third and fourth causes of action as set out in the complaint.

In the plaintiff's second cause of action, he contends that various officials of the city of Lebanon failed to follow certain procedural steps in terminating plaintiff's employment and that these procedural steps are mandated by

statute and by municipal ordinance. We have already determined in our prior decision in this matter that the procedural steps described by the plaintiff are not mandated by law and that the failure of the municipal-officials to conform to the suggested procedure was not illegal. Therefore, we must hold that the plaintiff's second cause of action fails as a matter of law.

In his third and fourth causes of action, the plaintiff contends that the conduct of the various defendants has deprived him of his "rights, property and reputation". Plaintiff argues firstly that the fact that the city has terminated his employment without publicly stating the reasons for said termination has impaired his ability to obtain new employment. For this he seeks compensatory damages.

Our review of the cases of *Bishop vs. Woods*, 426 U.S. 341 and *Board of Regents vs. Roth*, 408 U.S. 564, compel us to the conclusion that plaintiff's allegations in this regard do not give rise to cause of action for which compensation can be awarded.

Plaintiff also claims that the actions of the defendants may deprive him of "property" because, depending upon future events, his eligibility to receive pension benefits eight years from now may be jeopardized. Plaintiff apparently concedes that the defendants' failure to announce a reason for his dismissal would not in and of itself jeopardize his pension. Plaintiff contends however, that if the city announces its reasons for his dismissal before plaintiff reaches age fifty-two (52), and if said reasons include "dishonesty, cowardice, intemperate habits, or conviction of a felony" (Section 742.37 (C) (6) Revised Code), and if said reasons were accepted as true by the board of trustees of the police and firemens pension fund, he could then be deprived of his pension. Plaintiff's fears, regardless of how well founded they may or may not be, are, at

this point in time, merely conjectural. He will have to await the occurrence of the above described events, at which time appropriate remedial action will be available to him. At present, his action is premature and does not form the basis upon which compensatory relief can be awarded.

For all of the above reasons, it is the conclusion of the Court that the defendants' motion for judgment on the pleadings and for summary judgment is well taken and they will be sustained. Counsel for defendant shall prepare the appropriate judgment entry.

/s/ P. DANIEL FEDDERS
Judge.

cc: Roger B. Turrell
Arnold Morelli

AMENDMENT XIV (1868)

SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

ASSIGNMENT OF ERRORS IN COURT OF APPEALS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN DISMISSING PLAINTIFF'S COMPLAINT WHERE PLAINTIFF PLEADS A DEPRIVATION OF RIGHTS OF PROPERTY AND REPUTATION AND IS GIVEN NO HEARING TO ATTEMPT TO SHOW SUCH DEPRIVATION PURSUANT TO 42 U.S.C.A. SECTION 1983.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFF-RELATOR'S APPLICATION FOR WRIT OF MANDAMUS.

42 U.S.C. SECTION 1983**Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

AFFIDAVIT

LESTER KILBURN, first being duly cautioned and sworn deposes and says that he has personal knowledge of these facts and states as follows:

1. That his reputation has been damaged by his being fired, without reason given, by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.

2. That his employment opportunities have been greatly foreclosed by defendant Guard's action in that after 22 years as a police officer and chief of police with a spotless record, he has applied for a position either as chief of police, police officer, security officer, or insurance claims examiner in at least 12 instances unsuccessfully; that some of these prospective employers were Economy Fire and Casualty Insurance Company, Dayton Tire and Rubber Company, Doylestown, Ohio, Sabrina, Ohio, and Wayne Township, Montgomery County, Ohio.

3. That affiant believes that the manner and circumstances of his discharge by defendant Guard were the reason for his loss of reputation and foreclosed employment opportunities.

Further affiant sayeth not.

/s/Lester Kilburn
Lester Kilburn

STATE OF OHIO)
 ss:
BUTLER COUNTY)

LESTER KILBURN comes before me, a notary public in and for said county and state, and states that the facts contained in the foregoing affidavit are true.

/s/Lester Kilburn

Lester Kilburn

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal this 6th day of December, 1979.

/s/Suzanne M. James

Notary Public

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE, EX REL.,
KILBURN

CASE NO. 41248

Relator-Plaintiff

vs.

CHARLES GUARD,
et al

PLAINTIFF'S REPLY
MEMORANDUM CONTRA
DEFENDANTS' MOTION
FOR SUMMARY
JUDGMENT

Respondents-
Defendants

We cannot see how the cases cited by defendants apply here. Muskrat vs. United States, 219 U.S. 349 (1911), was a case where Cherokee citizens attempted to get a ruling that federal legislation was unconstitutional which increased and extended restrictions upon the alienation, encumbrance, or the right to lease allotments of lands allocated to Cherokee citizens. The plaintiffs, in that case, had not, to the time of bringing suit, had any effect upon them from the legislation.

The case of Massachusetts vs. Mellon, 262 U.S. 447 (1923) attempted to enjoin and annul an act of Congress. The court stated that a party must show injuries sustained "or threatened".

Rescue Army vs. Municipal Court, 331 U.S.

547 (1947) deals with an attempt to nullify ordinances of the City of Los Angeles on the basis that they purportedly placed a prior restraint on the exercise of religious freedom.

Eccles vs. Lakewood, 333 U.S. 426 (1947), had to do with the refusal of the Supreme court to grant a declaratory judgment when claims of injuries were supported only by affidavits against the possibility of a future enforcement if the condition was too speculative and uncertain to warrant anticipatory judicial determination. In Eccles, the bank, had within its powers the right to avoid any possibility of injury. In fact, it had not been injured and its own board of directors determined this. Nevertheless, the bank, without going through administrative procedures, wanted to get an injunction before the board of governors of the Federal reserve system attempting to revoke the bank's membership status in the system. This was an internal matter, basically. The court decided not to get involved.

Of course, the courts are reluctant to get involved when there is a speculative injury. Here, though, Lester Kilburn was fired, without reason given, and both the statute and regulations pertaining to pensions state that he can, at any time between his present age and retirement, be found to have lost all of his pension benefits. In all of these cases cited by defendants, the parties are in a clearly defined position. They know where they stand. And the Courts have said that they do not stand in any particular position of danger or jeopardy.

Not so in this instant case.

State, ex rel., Solomon vs. Bushong , 85 Ohio app. 333 (1949) is totally inapposite in our opinion. In that case, the Ohio Supreme Court refused to rule on the constitutionality of a code provision regarding the release of one held at Lima State Hospital after his sentence had expired. The reason, the court said, was that his sentence had not expired. He might be released before there is an issue. This case seems to have nothing to do with whether the complainant has been injured to the extent necessary to confer him standing before the Court.

Let us recapitulate for just a moment. Lester Kilburn served 22 years as a policeman. Eleven of these years was as chief of police. He, during all this time, built up vested pension rights. These pension rights were a property interest which had nothing to do with whether he was classified or not classified. Now, he has been fired without reason, so far as we have been able to ascertain. Certainly, he was given no written cause for his being fired.

Hanging over Lester Kilburn is the spector of the well publicized "investigation" which has now been taking place almost a year. The city attorney has promised, repeatedly, that the investigation report would be made and that copies of it would be given those directly affected. We have seen nothing except newspaper publicity. At present, Lester Kilburn is in a position where he has been fired under circumstances where

defendants have placed a cloud over him. The defendants, without ever stating one way or the other, know that his attempts to get employment, his attempts to practice his trade or profession are seriously jeopardized. Where does this leave Lester Kilburn?

The cases that apply here are:

1. Paul vs. Davis, 424 U.S. 693, 47 L. Ed.2d 405 (1976). In that case, which we have already cited and which defendants have discussed, stands for the proposition that an injury to reputation alone does not give rise to an action under Section 1983. However, plaintiff's attached affidavit shows that this is not what happened solely to Lester Kilburn. He had a difficult time finding a job. He still cannot find a job in his trade or profession, that is, as a policeman or chief of police. Reputation, linked with some more tangible interest such as employment is sufficient under Paul case to invoke due process on plaintiff's behalf. We believe that to be dispositive of this motion.

Wieman vs. Updegraff, 344 U.S. 183 (1952), where the Supreme Court held that a statute requiring state officers and employees to take a loyalty oath operated "...to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." This, the Court held was an indiscriminate classification of innocent with knowing association or membership in such organizations.

Is not, under the circumstances, this case analagous? Here Lester Kilburn was sub-

jected to government action which, whether innocent or not, has foreclosed him from other employment opportunities in his professional field.

This is the most important area where this Court must, we believe, see the issues as such that they cannot be held to be adverse to plaintiff to such an extent that a summary judgment can be rendered under Rule 56.

The holdings of the Wieman case and Board of Regents vs. Roth, 408 U.S. 564 (1972), hold that while a firing which causes damage to reputation, alone, is not sufficient to give standing, certainly an attendant foreclosure from other employment opportunity does.

We are stating here that Lester Kilburn has been deprived of employment opportunities without due process of law as well as the property interest in his pension rights previously described.

For these reasons, we urge the Court to overrule the Motion for Summary Judgment.

Respectfully submitted,

ROGER B. TURRELL CO., LPA

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Lester Kilburn

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Plaintiff's Reply Memorandum Contra Defendants' Motion for Summary Judgment has been sent by ordinary United States mail, postage prepaid, this 6th day of December, 1979, to all counsel of record.

/s/Roger B. Turrell

Roger B. Turrell

28 U.S.C. §1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. (June

25, 1948, c. 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat.590.)

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